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Landlord Protection Against Construction Liens Arising from Work Performed by Tenants

by Arthur J. Menor

Under the Florida construction lien law,[1] the real property of an "owner"[2] who contracts for improvements to the property is subject to construction lien liability. In a commercial lease setting, both the landlord and the tenant can be "owners" under the construction lien law, depending on which one of them enters into the contract for the improvement of the property. If the tenant enters into the contract for the improvements, she or he will be the owner for purposes of the construction lien law and, thus, liens arising from the work can attach to the tenant's leasehold interest in the property. In such a situation, can the landlord's interest also be subject to liens for the work being performed by the tenant?

Background

Section 713.10 of the construction lien law is entitled "Extent of Liens," and provides that a lien "shall extend to, and only to, the right, title, and interest of the person who contracts for the improvements as such right, title, and interest exists at the commencement of the improvement...." If, however, "an improvement is made by a lessee in accordance with an agreement between such lessee and her or his lessor, the lien shall extend also to the interest of such lessor."

This statute and its predecessors[3] have spawned significant litigation regarding whether construction liens for improvements performed by tenants[4] can attach to the landlord's interest in the leased premises. Florida law is clear that in order for the landlord's interest to be subject to liens arising from improvements made by a tenant, the lease must require the tenant to make certain improvements or the improvements must constitute the "pith of the lease."[5] Improvements are of the "pith of the lease" if they are "essential to the purpose of the lease" and "vital to its perpetuality."[6]

To avoid the murkiness of this judicial test, §713.10 and its predecessors provided a safe harbor for landlords such that even if improvements made by the tenant were required by the lease, or of the "pith of the lease," the landlord's interest would not be subject to liens for the improvements "when the lease is recorded in the clerk's office and the terms of the lease expressly prohibit such liability."[7]

Many landlords, and even some tenants, did not want to record the entire lease for confidentiality, title, and cost reasons. Thus, this safe harbor was not as useful as it otherwise could have been. Therefore, in 1985, the statute was amended to expand this safe harbor by providing alternatives to recording the entire lease. Specifically, the landlord could record either the lease or a short form of the lease or, if all of the leases entered into by the landlord prohibited such liability, the landlord could record a blanket notice setting forth the specific language contained in the various leases prohibiting such liability together with a statement that all of the leases contain such language.[8]

Commenting on the 1985 statutory amendments, the court in *14th & Heinberg, L.L.C. v. Henricksen & Co., Inc.*, 877 So. 2d 34, 38 (Fla. 1st DCA 2004), stated that: "In amending this statute, the [l]egislature obviously sought to provide a simplified and less costly manner in which lessors may provide notice to prospective contractors of their disclaimer of liability for improvements made by a lessee."

Unfortunately, there were some practical problems for landlords in using the two alternatives provided by the 1985 amendments. These problems were highlighted in *Everglades Electric Supply, Inc. v. Paraiso Granite, LLC*, 28 So. 3d 235 (Fla. 4th DCA 2010), in which the court found that a blanket notice recorded for a shopping center under F.S. §713.10 was ineffective because the lien prohibition language in one of the leases in the center varied from that in the notice.

The first alternative provided in the 1985 version of F.S. §713.10 — recording the lease or a short form of it — poses title problems for landlords. The lease or short form[9] remains of record forever unless terminated while leases expire or are terminated with regularity and the termination is generally not a matter of record. The title search obtained in connection with a sale or mortgage by a landlord will reflect all recorded leases or memoranda of leases, even leases that have expired or been terminated. The buyer or mortgagee is then on notice of any interest in the property claimed by the tenant, which would include not

only the tenant's leasehold interest but also other possible rights, such as to lease additional space or to purchase the property. In order to pass clear title, the landlord will need to eliminate of record all recorded leases or memoranda of them which are no longer in effect. This process can be time consuming and expensive. For this reason, it is not common, except in the case of major leases, for leases or notices of them to be recorded in Florida.

The second alternative provided in the 1985 version of F.S. §713.10 — recording a blanket notice setting forth the specific language contained in the various leases prohibiting such liability together with a statement that all of the leases contain such language — poses a different practical problem for landlords. Often when a landlord purchases a property he or she inherits leases that do not contain lien prohibition language which, under the holding in *Everglades Electric*, would mean the landlord could not record an effective blanket notice. Additionally, the lien prohibition language contained in the leases may vary in some of the leases. Under the holding in *Everglades Electric*, even where the landlord has substantially complied with the statute, a small, technical variation in the language of a single lease can lead to the blanket notice being found ineffective, thus, defeating the lien prohibition effect generally intended by the statute, even when lienors were not prejudiced by the technical noncompliance.

Another practical problem with the use of the blanket notice option under F.S. §713.10 is that many municipal building departments and city attorneys have taken the erroneous position that the landlord must be listed as the owner in, and must sign, the notice of commencement for work being performed by a tenant. When this happens, the safe harbor of F.S. §713.10 may be compromised, as lienors can claim that they were misled by the notice of commencement into believing that the landlord was performing the work.

F.S. §713.01(23) defines "owner" as "a person who is the owner of any legal or equitable interest in real property, which interest can be sold by legal process, and who enters into a contract for the improvement of the real property." A leasehold interest is a legal interest in real property that can be sold by legal process. Therefore, if a tenant enters into a contract for the improvement of its premises, it is the "owner" as to that project within the contemplation of, and should be listed as such in, and should sign, the notice of commencement. Further bolstering this interpretation is the language of F.S. §713.10 (emphases added) itself that a lien "shall extend to, and only to, the right, title, and interest *of the person who contracts for the improvements* as such right, title, and interest exists at the commencement of the improvement."

Notwithstanding the seemingly universal interpretation of the current law by practitioners in this area, municipalities, who are charged with certain responsibilities regarding notices of commencement,[10] frequently take the position that the landlord be listed as the owner in any notice of commencement for tenant improvements, even if the tenant is the party who enters into the contract for improvements. When a landlord who has otherwise complied with the lien prohibition requirements of F.S. §713.10 is forced to sign the notice of commencement, she or he faces the risk of loss of the protections otherwise afforded by §713.10, since lienors can then claim that they believed the landlord, and not the tenant, was the "owner" as to the improvements and, thus, §713.10 did not apply.[11]

2011 Legislation

In response to the issues summarized above as highlighted by *Everglades Electric*, the Real Property, Probate & Trust Law Section of The Florida Bar sponsored a bill that was introduced in the 2011 legislative session to amend §§713.10 and 713.13 of the Florida construction lien law in an effort to create greater certainty in extending the protection for landlords intended by F.S. §713.10. The bill, CS for CS for SB 1196, passed in a somewhat altered format from that originally proposed by the section and was enacted as Ch. 2011-2012, Laws of Florida. The highlights of the amendments to §713.10 effected by this bill are summarized below.

The blanket notice option can now be used even if all of the leases for the property do not contain lien prohibition language, so long as the lease under which work is being performed by a tenant contains the prohibition language and a blanket notice for the entire property is recorded and advises that all or a majority of the leases for the property contain lien prohibition language.

A new subsection (3) was added to grant lienors the right to obtain from landlords a verified copy of the provision in the lease between the landlord and the tenant prohibiting liability for improvements made by the tenant. If the landlord does not serve a verified copy of the lease provision within 30 days after demand or serves a false or fraudulent copy, her or his interest shall be subject to a lien by the party demanding the verified copy, provided such party is 1) otherwise entitled to a lien under the statute; and 2) did not otherwise have actual notice that the interest of the landlord is not subject to liens for improvements made by the tenant. The written demand must include a specified form of warning in conspicuous type.

The notice of commencement section of the Florida construction lien law, §713.13, was amended to clarify that the tenant should be listed as the owner in the notice of commencement when the tenant has contracted for the improvements with a statement that the ownership interest is a leasehold interest.

2012 Legislation

The intent of the 2011 bill sponsored by the Real Property, Probate & Trust Law Section of The Florida Bar was to make a blanket notice of lien prohibition effective to prevent liens from attaching to the landlord's interest in the property for work contracted by a tenant even if 1) all of the leases for the property did not include lien prohibition language; or 2) language in one or more leases varied from that in the notice. The final form of the 2011 bill effectively addressed the first issue of some leases not containing lien prohibition language, but was less clear on the second issue relating to varying versions of the lien prohibition language in the leases at the property for which the blanket notice had been recorded. Because the 2011 legislation did not modify that portion of §713.10 (2)(b)2.c that states that the blanket notice include "the specific language contained in the various leases prohibiting such liability," some practitioners felt that it was still possible that a court faced with the same fact pattern as that in *Everglades Electric* — a lease for a property that contains lien prohibition language that is different than the lien prohibition language in the blanket notice — could reach the same result as the *Everglades Electric* court and find the blanket notice ineffective to protect the landlord from liens arising from work performed by tenants.

Therefore, in 2012, the section sponsored legislation that added language to §713.10 (2)(b) confirming that a blanket notice will still be effective even if the lien prohibition language in the various leases for the property is not identical or does not match that in the blanket notice, so as long as the lease at issue contains some form of a lien prohibition. This legislation passed as CS for CS for HB 897, and was enacted as Ch. 2021-211, Laws of Florida.[12]

Conclusion

Landlords in Florida now have an improved means of protecting their property from construction liens arising from work performed by their tenants. Previously, landlords could effectively protect themselves against these liens as to a specific tenant by including in the lease with the tenant language expressly prohibiting such liability and then recording the lease or a short of it. Since for confidentiality, title problem, and cost reasons many landlords did not want to put notice of a lease of record, many of them utilized the other option provided in the 1985 amendments to F.S. §713.10 and recorded a blanket notice of lien prohibition for their entire property. The problems with use of the blanket notice option that were highlighted in *Everglades Electric* have been resolved by the 2011 and 2012 statutory amendments to F.S. §713.10, which make it clear that a blanket notice will still be effective even if all of the leases for the property do not contain lien prohibition language or the language in one or more leases varies from that in the notice.

As consideration for this improvement in the protection available to landlords, lienors have now been given a new tool. They can demand from the landlord a verified copy of the provision in the lease between the landlord and the tenant prohibiting liability for improvements made by the tenant. If the landlord does not serve a verified copy of the lease provision within 30 days after demand or serves a false or fraudulent copy, his or her interest shall be subject to a lien by the party demanding the verified copy provided such party is 1) otherwise entitled to a lien under the statute; and 2) did not otherwise have actual notice that the interest of the landlord is not subject to liens for improvements made by the tenant. This provides a dangerous situation for landlords as they can now be subject to liens by failing to respond to a demand for the lien prohibition language in the lease. This new tool for lien claimants is a new risk for landlords of which they need to be wary.

[1] Fla. Stat. Ch. 713, Part I.

[2] Fla. Stat. §713.10(23) (2011) defines “owner” as “a person who is the owner of any legal or equitable interest in real property, which interest can be sold by legal process, and who enters into a contract for the improvement of the real property. The term includes a condominium association pursuant to Ch. 718 as to improvements made to association property or common elements. The term does not include any political subdivision, agency, or department of the state, a municipality, or other governmental entity.”

[3] Fla. Stat. §84.101 (1963); Fla. Stat. §84.03 (1961).

[4] The statute uses the terms “lessor” and “lessee.” Most practitioners use the terms “landlord” and “tenant” since they are less likely to be mistakenly used for the wrong party. The terms landlord and tenant will be used in this article for greater clarity.

[5] *See 14th & Heinberg, L.L.C. v. Henricksen & Co., Inc.*, 877 So. 2d 34, 38 (Fla. 1st DCA 2004), and the cases cited in it.

[6] *Id.* at 38.

[7] *See* Fla. Stat. §713.10 (1983).

[8] *See* Fla. Stat. §713.10(2) (1985).

[9] The term “short form of lease” is not commonly used as the name of the document that is recorded in lieu of recording the entire lease. The term “memorandum of lease” is more prevalent.

[10] *See* Fla. Stat. §713.135.

[11] *See MHB Construction Servs., L.L.C. v. RM-NA Waterway Shoppes, L.L.C.*, 74 So. 3d 587 (Fla. 4th DCA 2011).

[12] The language that was added to Fla. Stat. §713.10 (2)(b) in 2012 is: “A notice that is consistent with subparagraph 2 effectively prohibits liens for improvements made by a lessee even if other leases for premises on the parcel do not expressly prohibit liens or if provisions of each lease restricting the application of liens are not identical.”

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